(2)

No. 96-622

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

MICHAEL D. O'NEILL,

Petitioner,

against

THE CITY OF AUBURN; GUY COSENTINO, Mayor of the City of Auburn; JAMES E. MALONE, City Manager for the City of Auburn; JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council; ANDREW V. LALONDE, as Corporation Counsel for the City of Auburn; and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counterstatement of the Issues

1. Does the doctrine of res judicata bar the current action by the plaintiff against the same defendants based upon facts litigated adversely to the plaintiff in an earlier action or facts that plaintiff could have raised in the earlier action?

2. Was this action, brought to redress alleged constitutional violations pursuant to 42 U.S.C. § 1983, properly removed to federal court from state court?

Counterstatement of the Case

On January 21, 1993, Michael O'Neill ("petitioner") filed suit against these respondents alleging deprivation of his liberty and property interests pursuant to the Fifth and Fourteenth Amendments of the United States Constitution (the "1993 Action"). App. 1.[1] In that action, Petitioner sought declaratory and injunctive relief, together with compensatory damages stemming from his allegedly improper termination as the City Engineer/Superintendent of Public Works for the City of Auburn, New York. *Id.*, p. 9.

A. The 1993 Action

Petitioner filed his 1993 action in Federal District Court for the Northern District of New York, alleging that the very same actions at issue in this case violated his civil rights then. In the 1993 action, petitioner alleged that he had "a valid property interest in his employment as the City Engineer/Superintendent of Public Works for the City of Auburn." *Id.*, ¶ "30". He claimed

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[1] Citation to the Appendices attached to this brief will be noted as: App. "[appendix number]"; citations to the petition will be noted as: Pet., p. "[page number]".

this interest was ignored when Respondents "failed and refused to afford plaintiff with notice and a hearing in accordance with New York Civil Service Law § 75, before terminating his employment . . . ." *Id.*, ¶ "31". Further, petitioner alleged that Respondents violated his Fifth and Fourteenth Amendment rights by abolishing the position of City Engineer/Superintendent of Public Works, depriving petitioner of any opportunity for reinstatement. *Id.*, ¶ "32".

Regarding his liberty interests, petitioner claimed that public disclosure of fallacious reasons for his termination irreparably stigmatized him as a licensed professional engineer. These acts were alleged to have "greatly humiliated [him] and held [him] up to public scorn, ridicule and derision . . . ." *Id.*, ¶ "37".

The Northern District of New York, granted summary judgment dismissing petitioner's claims and the Second Circuit Court of Appeals affirmed. *O'Neill v. City of Auburn*, 1993 U.S. Dist. Lexis 10958 (NDNY 1993), *affd*, 23 F.3d 685 (2d Cir. 1994) ("*O'Neill I*").

B. The 1995 Action

On September 15, 1995 petitioner commenced the present action in state court, tacking on a purported First Amendment violation that arose before his first action was filed, and adding some additional allegations purportedly to support his original claims ("*O'Neill II*"). Petitioner's 1995 complaint asserts eight separate claims for relief:

- The first claim alleges that he was improperly terminated without notice and hearing in violation of three separate sections of the New York Civil Service Law. App. "2", ¶¶ "38-40".

- The second claim asserts that petitioner's First Amendment rights were impermissibly abridged because of his involvement with a local newspaper critical of city management and because he was prevented from addressing the City Council about an ethics board investigation of him. *Id.*, ¶¶ "42-43".

- The third claim duplicates the claims brought in 1993 alleging violation of petitioner's liberty interests. *Id.*, ¶¶ "45-47".

- The fourth claim asserts an abrogation of petitioner's property interest in his employment as City Engineer/Superintendent of Public Works. *Id.*, ¶¶ "49-50".

- The fifth claim alleges a violation of his liberty interests because petitioner was reprimanded for his involvement with the above-referenced local newspaper. *Id.*, ¶¶ "52-54".

- The sixth claim alleges that Respondents failed to follow the City of Auburn, N.Y.'s civil service rules, as well as the New York State Civil Service Law in terminating plaintiff's employment. *Id.*, ¶ "56".

- The seventh claim repeats the allegations of the first claim based upon the State Civil Service Law. *Id.*, ¶ 58".

- The eighth claim repeats the first claim to the extent that it relates to the abolition of the position of City Engineer. *Id.*, ¶¶ "59-60".

Respondents removed the case to the Northern District of New York pursuant to 28 USC § 1441(a) & (b). Pet. 6a. Because all the allegations set forth in petitioner's current complaint either were asserted in the 1993 action or involve acts that occurred on or before the filing of the 1993 action, the present action was dismissed by the Northern District of New York on the ground that it is barred by the doctrine of res judicata. *Id.*, p. 15a. The Second Circuit Court of Appeals affirmed. *Id.*, p. 17a-18a.

ARGUMENT

POINT I

THERE ARE NO COMPELLING ISSUES THAT REQUIRE THIS COURT'S INVOLVEMENT

This case involves long settled principles of res judicata. Petitioner was represented by experienced counsel in the 1993 action. His claims were dismissed on a motion for summary judgment by the District Court for the Northern District of New York, affirmed by the Second Circuit Court of Appeals. *O'Neill I*. Dissatisfied with that result, petitioner filed this action pro se challenging the termination of his employment based on the same facts and circumstances present in the earlier action, adding only some embellished allegations and a claim for an alleged violation of his First Amendment rights based on events that pre-date the filing of the 1993 action.

Petitioner fails to offer any legitimate reason for this Court to entertain his second bite at the apple. In affirming the district court's grant of summary judgment in *O'Neill II*, the Second Circuit Court of Appeals neither conflicted with another United States Court of Appeals nor with a decision of a state court of

last resort. *See Braxton v. United States*, 500 U.S. 344, 347 (1991)("A principal purpose for which [the U.S. Supreme Court] use[s] [its] certiorari jurisdiction ... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of federal law"). Relying upon the opinion of the Northern District of New York, the Second Circuit affirmed bedrock legal principles behind the finality of judgments. It is also beyond peradventure that the Second Circuit's affirmance of the District Court's decision was well within the bounds of judicial proceedings such that this court need not exercise its supervisory powers. Moreover, the principles of res judicata were long ago laid out by this Court. Petitioner fails to point out how the dismissal of his case on res judicata grounds deviates from the precedents of this Court. Sup. Ct. R.10(a),(c).

As set forth below, petitioner's current case is a textbook example of the principles of and reasons for application of the doctrine of res judicata.

POINT II

PETITIONER'S CLAIMS WERE PROPERLY DISMISSED BECAUSE THEY ARISE OUT OF THE SAME FACTS LITIGATED IN THE EARLIER ACTION

A. Res Judicata Applies Fully to Plaintiff's 1995 Action

"[A] judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." *Grubb v. Public Utils. Comm'n of Ohio*, 281 U.S. 470, 479 (1930). Moreover, "[n]ew legal theories do not amount to a new cause of action so

as to defeat the application of the principal of res judicata." *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 638 (2d Cir. 1989) (citations omitted). Accordingly, "res judicata or claim preclusion 'prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided.' " *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992), *cert. den.*, 113 S. Ct. 977, 122 L.Ed.2d 131 (1993) (citations omitted). This doctrine clearly precludes the claims asserted by petitioner in the present action.

A comparison of the 1995 complaint with the 1993 complaint demonstrates that the 1995 complaint is nothing more than a repetition, with some embellishments, of the 1993 claims. Both complaints were based upon the termination of petitioner's employment, with an added First Amendment claim in the 1995 action based on facts occurring even prior to the termination of petitioner's employment.

In his first cause of action in 1993, petitioner claimed New York Civil Service Law bestowed upon him a protected property interest in his employment that could not be derogated without notice and a hearing prior to his termination. App. "1", ¶¶ "31-32". In his second cause of action in the 1993 action, petitioner claimed he was irreparably stigmatized by the public disclosure of fallacious reasons for his termination. These statements allegedly violated his liberty interests, for which he claimed entitlement to a name-clearing hearing. *Id.*, ¶¶ "36-37".

In the 1993 action, Respondents moved for summary judgment on both causes of action. They asserted that petitioner possessed no property interests in his municipal employment because he was an independent officer, a judicially created exception to the New York Civil Service Law. They further

claimed that the complained of comments failed to implicate a constitutionally protected liberty interest. The Northern District of New York granted Respondents' motion for summary judgment on both causes of action. The United States Court of Appeals for the Second Circuit affirmed, stating, with regard to the property interest claim:

> In our opinion, the district court correctly determined that the City Engineer—Superintendent of Public Works is an independent officer who, under applicable state law, is excluded from the protection of Civil Service Law § 75(1)(c). O'Neill thus had no property interest in retaining this position, and Respondents did not violate his right to due process of law by terminating him from a position without notice and a hearing. Respondents were properly granted summary judgment on O'Neill's first cause of action, and we affirm.

O'Neill v. City of Auburn, 23 F.3d 685, 690 (2d Cir. 1994).

With respect to petitioner's liberty interest complaint about statements impugning his professional competence, the court stated:

> Without passing here on whether or in what circumstances publicized statements of government officials to the effect, 'O'Neill is an incompetent engineer,' might have implicated his liberty interests, we can safely conclude that the vague statements of unspecified 'incompetence' did not damage O'Neill's professional reputation in a manner that required a hearing. Accordingly, we find that the District Court was correct in granting summary judgment as to these statements.

Id. at 693. In addressing petitioner's liberty interest claims in his 1993 action based upon comments about ethical concerns, the Second Circuit Court of Appeals upheld the grant of summary judgment because O'Neill failed to allege that these statements were false. *Id.* at 693-94.

Petitioner's 1995 state court complaint is nothing more than the proverbial attempt to take "a second bite at the apple." In repeating the earlier allegations about his property interest claims, petitioner now includes and emphasizes correspondence and conversations that occurred prior to his September 1992 termination. App. "2", ¶¶ "16-17". These documents and conversations allegedly show that he and the city had "an understanding" that he was entitled to civil service protection. He essentially parroted his previous allegations regarding the infringement of his liberty interest. The only new claim alleges that his First Amendment rights were violated in April 1992 when he was allegedly threatened with termination if he did not discontinue publication of a weekly newspaper critical of city management. He also newly alleges further that his First Amendment rights were violated when he was prevented from addressing the City Council on the results of a city ethics board investigation of which he was the subject.

Petitioner's claims in this action based upon defendant's alleged deprivation of rights secured to him by the Fifth and Fourteenth Amendments were presented and dismissed in the 1993 action. Thus, all the current allegations relating to alleged violations of his liberty and property interests were previously dismissed by the Second Circuit. The new allegations addressing the infringement of his First Amendment rights occurred in April 1992 and, thus, "might have been presented" in the earlier action. *Grubb, supra.* Petitioner's failure to allege the prior violation of his First Amendment rights in no way defeats

application of the doctrine of res judicata and the grant of summary judgment should be affirmed. *Grubb, supra; Woods, supra.* To promote the finality of judgements, dismissal of these allegations on grounds of res judicata should remain undisturbed.

B. Plaintiff Has Failed to Demonstrate an Exception to the Doctrine of Res Judicata

The additional allegations asserted by petitioner to support his original claims do not assist him in avoiding the bar of res judicata. These allegations consist primarily of alleged communications between petitioner and previous city managers concerning his entitlement to a hearing under Section 75 of the New York Civil Service Law. App. "2", ¶ 16. For example, petitioner claims that Respondents improperly withheld a September 18, 1991 letter from a prior City Manager to petitioner. He argues that this letter would have assisted him in establishing an "understanding" that he was entitled to a hearing. The September 18, 1991 letter, however, was addressed to petitioner; therefore, nothing prevented him from submitting the letter in the 1993 action. In any event, the fact that two of his predecessors were given hearings under the Civil Service Law held no sway in the earlier case. Petitioner unsuccessfully raised this argument in his appeal from the district court's judgment in 1993. *O'Neill*, 23 F.3d at 688, n. 1. As noted by the District Court in the current case, petitioner's counsel did not serve a discovery request for the letter in the 1993 action and Respondents did not improperly withhold it. Pet., p. 13a-14a.

Because petitioner was a party to these communications he could have invoked them in support of his claims in the 1993 action, in support of his motion for summary judgment in 1993, and in opposition to Respondents' cross-motion for summary

judgment in that action. His failure to do so bars his attempt to assert these allegations now. *Woods, supra*. Accordingly, all of petitioner's current claims are barred by res judicata and his current action was properly dismissed.

Petitioner attempts to avoid the doctrine of res judicata by claiming he was improperly denied discovery because the Northern District of New York "opted out" of required disclosure under the Federal Rules of Civil Procedure that were effective December 1, 1993. Pet., p. 9. The federal rules, however, explicitly state that required disclosure applies "except to the extent otherwise . . . directed by . . . local rule . . . ." Fed. R. Civ. Proc. 26(a)(1). By General Order 40 of the Northern District of New York, the District Court did just that. App. "3". Thus, the federal and local rules governing discovery at the time *O'Neill I* was pending required petitioner to seek discovery, and he failed to do so. Under these circumstances, summary judgment was proper and cannot now be attacked based on discovery issues.

Petitioner's challenge to the truth of the prior city manager's affidavit in the 1993 action is also to no avail. Petitioner clearly had personal knowledge of the facts he now alleges to try to show a change in the nature of his job duties and he offers no legally viable explanation for excluding them in the 1993 action. In any event, the Second Circuit found that the duties prescribed by the City of Auburn Code were sufficient to make petitioner an independent officer. *O'Neill*, 23 F.3d at 690.

Petitioner's claim that the federal court has not reached the merits in this case is similarly without merit. The district court, affirmed by the Second Circuit, dismissed his claims on a motion for summary judgment, which is the procedural equivalent of a trial. *Falk v. Goodman*, 7 N.Y.2d 87, 91 (1959). Thus,

petitioner had his opportunity to be heard and the cases he cites are inapposite.

Accordingly, the doctrine of res judicata applies to petitioner's claims in this action and the Second Circuit properly affirmed the District Court's dismissal of them on that basis. Petitioner has demonstrated no conflict between the circuits, departure from the course of judicial proceedings, nor any other compelling reason for this Court to exercise its discretion and grant review.

POINT III

THE CASE WAS PROPERLY REMOVED TO FEDERAL COURT

Petitioner asserts that because his claim for redress for violation of his property interest in his employment flows from state law, then his case should have been remanded to state court. *See* Pet., pp. "6-7". Petitioner confuses the source of his alleged property rights with the nature of his claim for relief. Although property rights must derive from contract or state law, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), petitioner's claims are asserted under a federal statute and the Constitution, thereby raising federal questions and providing removal jurisdiction. Once a case is removed to federal court, on issues of unsettled state law the federal court's "task is to predict how the state's highest court would rule". *O'Neill*, 23 F.3d at 689 (citing *In re Brooklyn Asbestos Litig. (Joint E. & S. Dist. Asbestos Litig.*, 971 F.2d 831, 850 (2d Cir. 1992)). In fact, the Second Circuit did so in *O'Neill I.*

Petitioner also seeks to have this case remanded to state court on the ground that it is the more appropriate forum. However, as

the district court noted, petitioner seeks redress of alleged constitutional violations pursuant to 42 § U.S.C. 1983. While state courts may have concurrent jurisdiction of Section 1983 claims, the district court properly noted that "the general rule is that 'absent an express provision to the contrary, the removal rights should be respected when there is concurrent jurisdiction.' " *Yurcik v. Sheet Metal Workers Int'l Assoc.*, 889 F.Supp. 706 (S.D.N.Y. 1995); *Mercy Hosp. Assoc. v. Miccio*, 604 F.Supp. 1177 (E.D.N.Y. 1985). Accordingly, petitioner's motion to remand this case to state court was properly denied.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari to review the dismissal of petitioner's claims on the ground of res judicata should be denied.

Dated: December 11, 1996

Respectfully submitted,

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Appendix 1 (Complaint in 1993 Action)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL D. O'NEILL,

Plaintiff,

-vs-

COMPLAINT
Civ—93-

THE CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council, ANDREW V. LALONDE, as Corporation Counsel for the City of Auburn, and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS.

JURY TRIAL DEMANDED

Defendants.

93—CV—100
JUDGE McCURN
MAG. DI BIANCO

Plaintiff Michael D. O'Neill, through his attorneys, Harris Beach & Wilcox, for his complaint against the Defendants, alleges and states:

PRELIMINARY STATEMENT

1. This action arises under the provisions of the Civil Rights Act of 1871, as amended, 42 U.S.C. 1981 *et seq*. The plaintiff, Michael O'Neill, seeks injunctive relief, compensatory and punitive damages to redress the deprivation of his rights secured to him by the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331, 1343(3), this being an action by law to and usage, of a right, privilege and immunity secured to plaintiff by the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

3. The unlawful employment practices alleged below were committed within the Northern District of the State of New York. 28 U.S.C. § 1391.

PARTIES

4. During all times mentioned in the Complaint, Plaintiff Michael D. O'Neill was and still is a resident of the City of Auburn.

5. Plaintiff was employed by the City of Auburn as City Engineer/Superintendent of Public Works from May, 1977 until defendants arbitrarily and without due process of law terminated his employment on September 14, 1992.

6. Upon information and belief and at all times herein mentioned, defendant Guy Cosentino was the Mayor of the City of Auburn ("Mayor Cosentino").

7. Upon information and belief and at all times herein mentioned, defendant James E. Malone was the City Manager for the City of Auburn.

8. Upon information and belief and all times herein mentioned, defendant James Hutchinson was a City Councilor for the City of Auburn.

9. Upon information and belief and at all times herein mentioned, defendant Ann Bunker was a City Councilor for the City of Auburn.

10. Upon information and belief and at all times herein mentioned, defendant Andrew V. LaLonde was Corporation Counsel for the City of Auburn.

11. Each defendant is sued individually and in his or her official capacity. Relief is sought against each and all defendants as well as its or their agents, assistants, successors, employees and all persons acting in concert or cooperation with them or at their direction.

FACTUAL BACKGROUND

12. Plaintiff is a professional engineer duly licenced pursuant to Article 145 of the New York Education Law.

13. Plaintiff was honorably discharged from the armed forces after serving during a time of war as defined by the New York Civil Service Law §§ 75, 85.

14. Plaintiff was hired by the City of Auburn as City Engineer/Superintendent of Public Works in May, 1977.

15. The position of City Engineer/Superintendent of Public Works is classified as a non-competitive class civil service position by the Auburn Municipal Civil Service Commission pursuant to the Auburn Municipal Civil Service Commission "Rules and Regulations" dated 1970.

16. An employee holding a non-competitive class civil service position who has five years of service in that position or who is

a honorably discharged veteran is entitled to, among other things, the rights afforded by New York Civil Service Law § 75 prior to dismissal from employment.

17. By memorandum dated July 3, 1992, City Manager James Malone requested Plaintiff to resign from his position as City Engineer/Superintendent of Public Works no later than September 13, 1992.

18. By letter dated September 16, 1992, Plaintiff advised Malone that he would not resign.

19. By letter dated Thursday, September 17, 1992, City Manager James Malone terminated Plaintiff's employment "as of 5:00 P.M. Friday, September 18, 1992" and further informed Plaintiff of his intention to abolish the position of City Engineer/Superintendent of Public Works.

20. Plaintiff was terminated without having been afforded the rights guaranteed by the New York Civil Service Law § 75, including: written notice informing him of the proposed removal; written charges preferred against him; an opportunity to answer those charges and a full and fair hearing on the record.

21. Plaintiff, an honorably discharged veteran, had completed more that fifteen (15) years of continuous service in the position of City Engineer/Superintendent of Public Works at the time his employment was terminated.

22. The newspaper reports of Plaintiff's termination contained statements from unidentified sources from the City of Auburn that are false and defamatory and that affect Plaintiff's good name, reputation, honor and integrity.

23. On September 18, 1992, the Auburn, New York newspaper, The Citizen, stated that "according to sources at City Hall" O'Neill was fired for "incompetence" and that O'Neill could "no longer do the job."

24. On September 19, 1992, a Syracuse, New York newspaper, The Post-Standard, reported that City of Auburn officials, who asked to remain anonymous, said that O'Neill's work was

not "up to par," that he had "poor relationships" with state agencies, and that there was "sloppiness" in O'Neill's work on recent projects.

25. Plaintiff, through his attorneys, by letter dated September 23, 1992 sent to Mayor Cosentino, City Manager Malone, the City Councilors and Civil Service Commissioners, informed them that the termination of Plaintiff's employment was in violation of New York Civil Service Law § 75, and that plaintiff should be reinstated until the requirements of New York Civil Service Law § 75 were met. This letter also suggested that Mayor Cosentino, City Manager Malone, the City Councilors and Civil Service Commissioners should not abolish the position of City Engineer/Director of Public Works until Plaintiff had been afforded his rights under New York Civil Service Law § 75.

26. At the September 24, 1992 City Council meeting, defendants Hutchinson, Bunker, and Mayor Cosentino voted to abolish the position of City Engineer/Superintendent of Public Works formerly held by Plaintiff.

27. By letters dated October 2, 1992 and October 21, 1992, to defendant LaLonde, Plaintiff, through his attorneys, again apprised the Defendants of Plaintiff's rights under the New York Civil Service Law, and reminded them that their action was in violation of New York Civil Service Law.

28. Defendant LaLonde responded to Plaintiff's attorneys by letters dated October 8, 1992 and October 30, 1992, that the City (a) disagreed with Plaintiff's position; (b) had concluded that Plaintiff was not entitled to protection under New York Civil Service Law § 75, and (c) was entitled to abolish the position which Plaintiff had held.

FIRST CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "28" of this complaint as if set forth herein at length.

30. Plaintiff has a valid property interest in his employment as the City Engineer/Superintendent of Public Works for the City of Auburn.

31. The actions of Defendants, and each of them, violated the Fifth and Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983, in that by acting in concert and failing and refusing to afford Plaintiff with notice and a hearing in accordance with New York Civil Service Law § 75, before terminating his employment, they have deprived Plaintiff of property without due process of law.

32. The actions of Defendants, and each of them, further violated the Fifth and Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983, in that by acting in concert and abolishing the position of City Engineer/Superintendent of Public Works in bad faith, they have deprived Plaintiff of reinstatement to the position he formerly occupied, for which he possesses a valid and protectable property interest and did thereby further act to deprive Plaintiff of his rights under New York Civil Service Law § 75.

33. As a proximate result of the illegal actions of the Defendants alleged above, Plaintiff has been deprived of his employment as the City Engineer for the City of Auburn since September 18, 1992, and has suffered mental anguish and emotional distress and a loss of income and benefits as well as diminished reputation in the community and diminished opportunity to pursue his chosen career.

SECOND CAUSE OF ACTION

34. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "33" of this complaint as if set forth herein at length.

35. The actions of Defendants, and each of them, violated the Fifth and Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983, in that by publicly disclosing fallacious reasons for termination of Plaintiff's employment Defendants irreparably stigmatized Plaintiff's reputation as a licenced professional engineer and foreclosed future employment opportunities.

36. These public disclosures, stemming from Plaintiff's unlawful termination and the abolition of the position of City Engineer/Superintendent of Public Works, were in derogation of Plaintiff's liberty interest guaranteed by the Fifth and Fourteenth Amendment to the Constitution of the United States subject to redress under 42 U.S.C. § 1983.

37. As a direct and proximate result of the aforesaid acts of the Defendants, and each of them, Plaintiff suffered great mental anguish, from then until now, and he will continue to so suffer in the future; and he has lost and will in the future lose great sums of money by reason of his discharge from employment and having been greatly humiliated and held up to public scorn, ridicule and derision as a result of the foregoing acts of the Defendants.

WHEREFORE, Plaintiff demands relief as follows:

a. Compensation in the amount of back pay and reimbursement for lost pension, Social Security, experience, and other benefits in an amount to be shown at trial, and other injunctive relief including, but not limited to, reinstatement of Plaintiff to his position as City Engineer/Superintendent of Public Works or a noncompetitive class civil service position requiring similar engineering skills and offering similar compensation;

b. Compensatory damages in the amount of three million dollars ($3,000,000.00);

c. Punitive damages in the amount of one million dollars ($1,000,000.00); and

d. Plaintiff's attorney's fees, costs and disbursements in bringing this action;

e. Such other and further relief as the Court deems just and proper.

Dated: January 18, 1993
Ithaca, New York

HARRIS BEACH & WILCOX

By: s/Illegible
of counsel

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U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
JAN 21 1993
AT_____O'CLOCK____M
GEORGE A. RAY, CLERK
SYRACUSE

Appendix 2 (Complaint in 1995 Action)

Supreme Court
County of Cayuga State of New York

MICHAEL D. O'NEILL,

Plaintiff,

Index. No.

-vs-

Summons

THE CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council, ANDREW LALONDE, As Corporation Counsel for the City of Auburn, and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS.

Defendants.

To the above named Defendant

You Are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney(s) within 20 days after the service of this summons, exclusive of the day of service, where service is made by delivery upon you personally within the state, or within 30 days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Cayuga County as the place of trial.

The basis of the venue is Residence of Parties.

Plaintiff resides at 26½ Hockeborn Avenue, Auburn, New York 13021
dated this 15th day of September 1995

Michael D. O'Neill
Pro Se
Attorney(s) for Plaintiff
Office and Post Office Address

'95 Sep 15 PM 2 45
FILED
CAYUGA COUNTY
CLERK'S OFFICE

RECEIVED
SEPT 5 1995
CORPORATION COUNSEL'S OFFICE
CITY OF AUBURN, NY

MICHAEL D. O'NEILL,

Plaintiff,

SUMMONS
& COMPLAINT
Civ-94

-vs-

THE CITY OF AUBURN, GUY COSENTINO, Mayor of the City of Auburn, JAMES E. MALONE, City Manager for the City of Auburn, JAMES HUTCHINSON, ANN BUNKER, Councilors of the Auburn City Council, ANDREW LALONDE, As Corporation Counsel for the City of Auburn, and OTHER UNKNOWN AND UNNAMED PARTICIPANTS IN THE COMPLAINED OF ACTS.

Defendants.

Plaintiff Michael D. O'Neill, pro se, for this complaint against the defendants, alleges and states.

PRELIMINARY STATEMENT

1. This action arises under the provisions of the Civil Rights Act of 1871, as amended, 42 U.S.C. 1981 *et seq.* The plaintiff, Michael D. O'Neill, seeks declaratory relief, injunctive relief and compensatory and punitive damages to redress the deprivation of his rights from discriminatory employment practices by defendants and to redress the deprivation of a right, privilege and immunity secured to the plaintiff by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, 42 USC & 1983, USC &1985, by custom of the City of Auburn, and under the Auburn Civil Service Rules and Regulations.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked under 28 USC && 1331, 1343(3), this being an action by law to redress the deprivation under color of state law, statute, custom and usage, of a right, privilege and immunity secured to plaintiff by the First, Fifth and Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. section 1983. 42 U.S.C. section 1985, the Auburn Civil Service Rules and Regulations and by custom of the City of Auburn.

3. All causes of action allege in this complaint arise out of the same nucleus of common operative fact as the First, Second and Third causes of action, and are subject to the pendent jurisdiction of this Court in order to eliminate the need for duplicative litigation in other courts.

4. The unlawful employment practices alleged below were committed in The City of Auburn, County of Cayuga, State of New York within the Northern District of the State of New York. 28 U.S.C. & 1391.

PARTIES

5. During all times mentioned in the Complaint, Plaintiff Michael D. O'Neill was and still is a resident of the City of Auburn. Plaintiff was employed by the City of Auburn as a Senior Civil Engineer, a competitive civil service position, and as City Engineer/Superintendent of Public Works, a noncompetitive civil service position, from May, 1977 until defendants arbitrarily and without due proces of law discharged him on September 18, 1992.

6. Upon information and belief and at all times herein mentioned, defendant Guy Cosentino was the Mayor of the City of Auburn.

7. Upon information and belief and at all times herein mentioned, defendant James E. Malone was the City Manager for the City of Auburn.

8. Upon information and belief and at all times herein mentioned, defendant James Hutchinson was a City Councilor for the City of Auburn.

9. Upon information and befief and at all times herein mentioned, defendant Ann Bunker was a City Councilor for the City of Auburn.

11. Upon information and belief and at all times herein mentioned, defendant Andrew V. LaLonde was Corporation Counsel for the City of Auburn.

12. Each defendant is sued individually and in his/her official capacity. Relief is sought against each and all defendants as well as its or their agents, assistants, successors employees and all persons acting in concert or cooperation with them or at their direction.

FACTUAL BACKGROUND

13. Plaintiff is a professional engineer duly licensed pursuant to Article 145 of the New York State Education Law.

14. Plaintiff was honorably discharged or released from the armed forces after serving during a time of war as defined by Sections 75, 85 and 86 of the New York State Civil Service Law.

15. Plaintiff, Michael D. O'Neill, was hired by the City of Auburn as Senior Civil Engineer in May 1977 and as City Engineer/Superintendent of Public Works in May 1978.

16. The position of City Engineer/Superintendent of Public Works is classisfied as a non-competitive class civil service position by the Auburn Municipal Civil Service Commission pursuant to the Auburn Municipal Civil Service Commission "Rules and Regulations" dated 1970, and as such the procedural

20. By "confidential" memorandum dated July 3, 1992, City Manager James Malone advised Plaintiff that he should resign from his position as City Engineer/Superintendent of Public Works no later than September 13, 1992 because the local news media's coverage of Plaintiff created a negative perception of City government in the community.

21. By letter dated September 16, 1992, Plaintiff advised Malone that he had no intention of resigning and would continue to report to work unless told in writing that his employment had been terminated by the City.

22. By letter dated Thursday, September 17, 1992, City Manager James Malone terminated Plaintiff's employment "as of 5:00 P.M. Friday, September 18, 1992" and further informed Plaintiff of his intention to abolish the position of City Engineer/Superintendent of Public Works. Plaintiff O'Neill's first knowledge of his termination was when The Citizen newspaper was read to him over the telephone at 11:30, September 18, 1992. Subsequently a letter was delivered to Plaintiff O'Neill's residence at 1:15 that day by the Auburn Police Department which O'Neill read at 5:30 that evening.

23. Plaintiff was terminated without having been afforded the procedural rights guaranted by custom of the City of Auburn and by Section 75 of the Civil Service Law, including: written notice informing him of the proposed removal; written charges preferred against him; and opportunity to answer those charges and a full and fair hearing on the record.

24. Plaintiff had completed more than fifteen (15) years of continuous service in the positions of Senior Civil Engineer and City Engineer/Superintendent of Public Works at the time his employment was terminated.

25. During his tenure as City Engineer/Superintendent of Public Works Plaintiff rendered competent service to the City of Auburn. Plaintiff's performance at all times relevant hereto had been exemplary and no issue exists as to his ability to continue

to so perform. Defendant did illegally remove Plaintiff's job duties by ; removing Solid Waste Duties, removing sewer duties, removing water duties, removing street duties, removing utility duties, removing parking garage duties removing Public Works duties and removing all duties except technical advise to Departments. All of the foregoing were done in July 1992, 3 months prior to O'Neill's firing and 6 months prior to Civil Service action. The positions were illegally filled by July 1992 cleverly and illegally prohibiting O'Neill's section 86 Civil Service rights and bumping rights.

26. On Friday, September 18, 1992, the official date of Plaintiff's termination, and Saturday, Setpember 19, 1992, the Auburn newspapers, The Citizen and The Post-Standard published reports that various elected City Officials said that: Plaintiff had been given "the resign or-be-canned ultimatum some time ago"; Plaintiff was not a "good" engineer; Plaintiff's management of City engineering projects was sloppy; Plaintiff was fired because he was "incompetent"; and that City Manager James Malone believed Plaintiff to be an "incompetent" engineer. Previous articles falsely and libelously accused O'Neill of taking kickbacks from Contractor Vitale, falsely accused O'Neill of taking kickbacks from Contractor Newric, falsely accused O'Neill of working on City projects with his private company and being paid by the City to his private surveying firm, falsely and discriminatorily accused by the Ethics Board of ethics violations, improperly and illegally administrating bid awards.

27. On at least one occasion after Plaintiff's employment had been terminated City Councilor Mark Fandrich stated that Plaintiff had made enough mistakes as City Engineer that City Manager James Malone did not need to be concerned about failing to afford Plaintiff his procedural rights.

28. Plaintiff's attorneys advised the Mayor, City Manager, City Councilors and Civil Service Commissioners, by letter

dated September 23, 1992, that Plaintiff should be reinstated pending the filing of written charges against him because his discharge was in violation of the procedural rights he is entitled to under the New York State Civil service Law, local custom and the improper reclassification of rights provided Plaintiff O'Neill pursuant to section XXIII, paragraph 6, of the Auburn Civil Service Rules and Regulations. Defendant acted in bad faith chronically, continuously and illegally over a period of several months.

Plaintiff's attorneys also advised that the position of City Engineer/Director of Public Works should not be eliminated until Plaintiff had been afforded his procedural rights.

29. The agenda for the Thursday, September 24, 1992, meeting of the Auburn City Council included a proposal to amend the City's Management Ordinance to abolish the position of City Engineer/Superintendent of Public Works, and delete reference to the position of City Engineer and substitute therefor the position of City Manager under Chapter forty-four (44) of the Ordinance entitled, "City of Auburn Streets and Public Places".

30. The Mayor, City Manager, City Councilors and Corporation Counsel received and reviewed the letter from Plaintiff's attorney, dated September 23, 1992, prior to the City Council meeting scheduled for the following day.

31. During discussion of the proposal to abolish the position of City Engineer/Superintendnent of Public Works at the Thursday, September 24th Council meeting, City Councilor Christopher DeAngelis informed the above captioned Defendants that Plaintiff's dismissal was a violation of due process and that the contemplated action of eliminating Plaintiff's position might be a further violation of his rights, particularly in light of the letter that the Mayor, City Manager and Councilors had received from Plaintiff's attorneys advising them of Plaintiff's rights under the Civil Service Law.

32. At the conclusion of this discussion that took place during the Thursday, September 24, 1992, Council meeting, the above captioned Defendants caused the Management Ordinance to be amended so as to abolish the position of City Engineer/Superintendent of Public Works and deleted reference to the position of City Engineer under Chapter forty-four (44) of the Ordinance but not City Charter references.

33. Plaintiff's attorneys again attempted to apprise the above captioned defendant of Plaintiff's rights under the Civil Service Law and local rules through letters dated October 2nd and 21, 1992, requesting Plaintiff's reinstatement pending written charges and a full and fair hearing on the record pursuant to the requirements of the Civil Service Law.

34. In response, Andrew LaLonde, Corporation Counsel for the City of Auburn, advised Plaintiff's attorneys by letters dated October 8 and 30, 1992, that the City considered the job classification City Engineer/Superintendent of Public Works to be "confidential or requiring the performance of functions influencing policy" and that the Auburn Civil Service Commission's failure to officially designate the position as "confidential" or "policy-influencing" as required by Section 22 of the Civil Service Law was "inconsequential".

35. LaLonde also asserted, in his letter dated October 30, 1992, that Plaintiff was a "confidential" employee for purposes of the New york State Public Employemnt Relations Law (The Taylor Law). Yet, Plaintiff and those positions similarly situated are not represented by a Union in their employment with the City of Auburn, and therefore, they do not have nor do they need such designation for purposes of the Taylor Law.

36. The above captioned Defendants' refusal to afford Plaintiff rights secured by the New York State Civil Service Law, by custom and by the Auburn Civil Service Commission Rules and Regulations, in combination with the subsequent elimination of his job title, were deliberate and intentional acts

of discrimination done with prior knowledge of their illegality and/or were perpetuated after their illegality had conclusively been demonstrated.

36a. Defendants further acted in bad faith and denied Plaintiff O'Neill procedural rights by improperly removing his job duties from the position of City Engineer/Superintendent of Public Works by budget dated July 1, 1992. In that budget Defendant illegally removed job duties from Plaintiff by illegally creating the positions of Director of Streets, Director of Solid Waste and Director of Utilities. These positions were illegally filled but not approved by the Civil Service commission untile December 1992, conveniently after O'Neill's firing. The Defendant then illegally created the position of Director of Engineering Services to perform O'Neill's duties. Plaintiff O'Neill was not notified of this de facto reclassification, had his job duties illegally transfered without due process, and performed by others thus denying plaintiff his procedural rights under section 86 of the Civil Service Law and in further violation of the Auburn Civil Service Rules and Regulations. By affidavit in a federal case City Manager Malone lied about these very same job duties which he illegally removed from Plaintiff O'Neill. In that matter Malone lied knowingly stating O'Neill was an Independent Officer and falsely stated O'Neill was acting City Manager and that O'Neill still performed duties which Malone had taken away in July 1992. Defendant lied about Plaintiff O'Neill's performance on several occasions to set up O'Neill's firing. Plaintiff O'Neill presented Malone with exculpatory evidence on each falsely accused point.

FIRST CAUSE OF ACTION

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "36" of this complaint and Plaintiff's Affidavit as if set forth herein at length.

38. The actions of Defendants, and each of them, violated the First, Fifth and Fourteenth Amendment to the United States Constitution in that by acting in concert and failing and refusing to afford Plaintiff with notice and a hearing, as was the custom in the City of Auburn as City Engineers/Superintendants of Public Works George Govern and Major David Dunning received hearing rights, Defendants acted in violation of Section 75 and 86 of the Civil service Law, and defendant acted in total disregard and in violation of the procedures for reclassifying positions of section 22 of the NYS Civil Service Law and in violation of the Auburn Civil Service Commission Rules and Regulations, before terminating his employment, they have deprived Plaintiff of property without due process of law. Plaintiff was not aware of these actions at the time of a previous filing of the federal action.

39. The actions of Defendants, and each of them, violated the First, Fifth and Fourteenth Amendment to the United States Constitution in that by acting in concert and abolishing the position of City Engineer/Superintendent of Public Works, before affording Plaintiff with notice and a hearing in accordance with local Civil Service Rules, custom and Section 75 and 86 of the Civil Service Law, they have deprived Plaintiff of potential reinstatement to the positions he formerly occupied, for which he posses a valid and protectable property interest and Defendant violated Plaintiffs First Amendment rights by forcing Plaintiff to stop publishing THE RECORD newspaper.
Positions and job duties to which Plaintiff had section 86 rights, custom, local Civil Service rules and due process procedures. Plaintiff O'Neill had a budgeted position and therefore a contract through the budget year, as a minimum.

40. As a proximate result of the illegal actions of the Defendants alleged above, Plaintiff has been deprived of his employment with the City of Auburn since September 18, 1992, and has suffered a loss of income and benefits, as well as diminished

reputation in the community and diminished opportunity to pursue his chosen career.

SECOND CAUSE OF ACTION

41. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "40 of this complaint and Plaintiff's Affidavit as if set forth herein at length.

42. The actions or Defendants, and each of them, violated the First Amendment to the United States Constitution in that Plaintiff was summarily dismissed from his employment as City Engineer/Superintendent of Public Works for reasons that impermissibly abridged his constitutionally protected speech under the First Amendment. Defendant Malone reprimanded Plaintiff O'Neill for his involvement with The Record newspaper, City Councilors Bunker and Fandrich attempted to prevent Plaintiff O'Neill from addressing City Council to complain about an improper Ethics Board investigation of Plaintiff O'Neill, a violation of O'Neills first amendment rights.

43. As a direct and proximate result of the aforesaid acts of the Defendants, and each of them, Plaintiff suffered great mental anguish, from then until now, and he will continue to so suffer in the future; and he has lost and will in the future lose great sums of money by reason of his discharge from employment and having been greatly humiliated and held up to public scorn, ridicule and derision as a result of the foregoing acts of the Defendants.

THIRD CAUSE OF ACTION

44. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "43" of this complaint and Plaintiff's Affidavit as if set forth herein at length.

45. The actions of Defendants, and each of them, violated the First, Fifth and Fourteenth Amendment to the United States Constitution in that by publicly disclosing fallacious reasons for termination of Plaintiff's employment Defendants irreparably stigmatized Plaintiff's reputation as a Licensed Professional Engineer and foreclosed future employment opportunities and reducing and damaging Plaintiff's community standing. Defendant and Defendant Counsel Bond, Schoeneck and King, continues these actions in 1995 by falsely and publicly accusing Plaintiff of misconduct in the case of Marcy Excavation vs. The City of Auburn.

46. These public disclosures, stemming from the unlawful termination and abolition of the position of City Engineer/Superintendent of Public Works, were in derogation of Plaintiff's liberty interest guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendment to the Constitution of the United States subject to redress under 42 U.S.C. Section 1983 and section USC 1985.

47. As a direct and proximate result fo the aforesaid acts of the defendants, and each of them, Plaintiff suffered great mental anguish, from then until now, and he will continue to so suffer in the future; and he has lost and will in the future lose great sums of money by reason of his discharge from employment and having been greatly humilated and held up to public scorn, ridicule and drision as a result of the foregoing acts of the Defendants.

FOURTH CAUSE OF ACTION

48. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "47" of this complaint and Plaintiff's Affidavit as if set forth herein at length.

49. The actions of Defendants, and each of them, in summarily terminating Plaintiff's employment without affording him

notice and opportunity to be heard, abolishing his position, thus foreclosing potential reinstatement to the position for which he possess a valid property interest, and falsely, intentionally and maliciously disseminating, personally and professionally damaging reasons for the termination constitutes extreme and outrageous conduct designed to intimidate, humiliate and cause Plaintiff severe emotional distress.

50. As a proximate result of the illegal actions of The Defendants allege above, Plaintiff has suffered severe mental anguish and emotional distress.

FIFTH CAUSE OF ACTION

51. Plaintiff repeats and realleges each and every allegation contained inparagraphs "1" through "50" of this complaint and Plaintiff's Affidavit as if set forth herein at length.

52. Defendants did conspire to publicly defame plaintiff's liberty interest in order to justify their illegal acts denying plaintiff due process, and first amendment rights by reprimanding plaintiff for his involvement with The Record newspaper and attempting to deny plaintiff access to address city council. Plaintiff was fired for political reasons as plaintiff was told by City Manager James Moochler by stating to Plaintfiff "there is a power struggle going on and if it comes between you (O'Neill) and me (Moochler) You're (O'Neill) gone", Plaintiff was a member of a protected political affiliation group, in violation of USC 1985 and USC 1983.

53. Plaintiff was defamed and libeled continually, conspiratorally and wrongfully in the last five years by City Officials and THE CITIZEN newspaper.

54. CITIZEN Publisher Jack Palmer publicly stated he would "get O'Neill".

SIXTH CAUSE OF ACTION

55. Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through "54" of this complaint and Plaintiff's Affidavit as if set forth herein at length.

56. The actions of the Defendants, and each of them, in failing to follow rule XXIII of the Auburn Civil Service Rules, in an illegal de facto reclassification of the position of City Engineer denied plaintiff his due process rights. Plaintiff was not notified as required of the reclassification of his position, the removal of job duties and those duties being illegally given to others in violation of Civil Service Law section 22 and local rules.

SEVENTH CAUSE OF ACTION

57. Plaintiff repeats and realleges each and every allegation contained in paragraph "1" through 56" of this complaint and Plaintiff's Affidavit as if set forth herein at length.

58. The actions of the defendants, and each of them, in failing to follow section 22 of the Civil Serive Law, in a de facto reclassification of the position of City Engineer denied plaintiff his due process rights of section 75, by custom and his property interest and tenure rights of section 86 in his position and the due process rights of local civil service rule XXIII.

EIGHTH CAUSE OF ACTION

Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "58" of this complaint.

59. Defendants denied plaintiff his section 86 rights by acting in bad faith to abolish the position of City Engineer after improperly creating the positions of Director of Solid Waste, Director of Streets, Director of Engineering Services and Director of Municipal Utilities and subsequently lying to a

federal court stating Plaintiff still performed those duties which were improperly removed by defendant.

60. Defendant acted in bad faith by falsely accusing Plaintiff O'Neill in a letters and in newspaper articles. Defendant explained at length in his afffadavit that O'Neill almost single handedly built the landfill, the first in New York State, single handedly negotiated a multi million dollar contract with NYSEG for hydropower, single handedly got grants and other city benefits but then intentionally and in bad faith leaked to the media that O'Neill was incompetent.

WHEREFORE, Plaintiff demands relief as follows:

a. A declaratory judgement that defendant's policies, and practices and procedures complained of herein violated Plaintiff's rights as secured under the First, Fifth and Fourteenth amendments to the Constitution of the United States and 42 U.S.C. Section 1983;

b. A permanent injunction enjoining the defendants and all those acting in concern with them and their direction, from engaging in any discriminatory employment policy or practice against Plaintiff;

c. Compensation in the amount of back pay and reimbursement for lost pension, Social Security, experience, and other benefits in an amount to be shown at trial, and other affirmative relief including, but not limited to, reinstatement of Plaintiff to his position as City Engineer/Superintendent of Public Works or a noncompetitive class civil service position requiring similar engineering skills and offering similar compensation;

d. Compensatory damages in the amount of two million dollars ($2,000,000.00);

e. Punitive damages in the amount of 2 million dollars ($2,000,000.00); and

f. Plaintiff's attorney's fees, costs and disbursements in bringing this action;

g. Such other and further relief as the Court deems just and proper.

DATE: September 15, 1995

State of NEW YORK
County of Cayuga

BY:s/Michael D. O'Neill
Michael D. O'Neill
Pro se

STATE OF NEW YORK
COUNTY OF CAYUGA SS:

MICHAEL D. O'NEILL BEING SWORN SAYS: I AM THE PLAINTIFF IN THE ACTION HEREIN; I HAVE READ THE ANNEXED COMPLAINT KNOW THE CONTENTS THEREOF AND THE SAME ARE TRUE TO MY KNOWLEDGE, EXCEPT THOSE MATTERS THEREIN WHICH ARE STATED TO BE ALLEGED ON INFORMATION AND BELIEF, AND AS TO THJOSE MATTERS I BELIEVE THEM TO BE TRUE.

BY:s/Michael D. O'Neill
MICHAEL D. O'NEILL

SWORN TO BEFORE ME ON: 9/15/95
s/Robert E. Marsh
ROBERT E. MARSH
Notary Public in the State of New York
Qualified in Onon. County No. 01MA4777284
My Commission Expires April 30, 1996

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FILED
CAYUGA COUNTY
CLERK'S OFFICE

Appendix 3
(General Order 40 of the Northern District of New York)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

In the Matter of	:	(Amended) GENERAL ORDER #40
Local Rules of Civil Procedure	:	

After a meeting of the Judges of the Northern District of New York, the following General Order was approved as it relates to the implementation of the Federal Rules of Civil Procedure effective December 1st, 1993.

Federal Rules of Civil Procedure 26(a)(1), (2) and (3) (insofar as it provides for mandatory disclosures without request), 30(a)(2)(A) (insofar as it limits the number of depositions), 31(a)(2)(A) (insofar as it limits the number of depositions upon written questions), and 33(a) (insofar as it limits the number of interrogatories), shall not become operative in this District without further order of this court, thus enabling the court to give appropriate study to the final version of these rules while Congress is reviewing same.

SO ORDERED.

Dated: December 14th, 1993
at: Binghamton, New York

s/Thomas J. McAvoy
Thomas J. McAvoy
Chief Judge

Illegible
DEC 14 1993
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GEORGE A. RAY, CLERK
BINGHAMTON